

Expert Discovery

QUESTIONS REMAIN

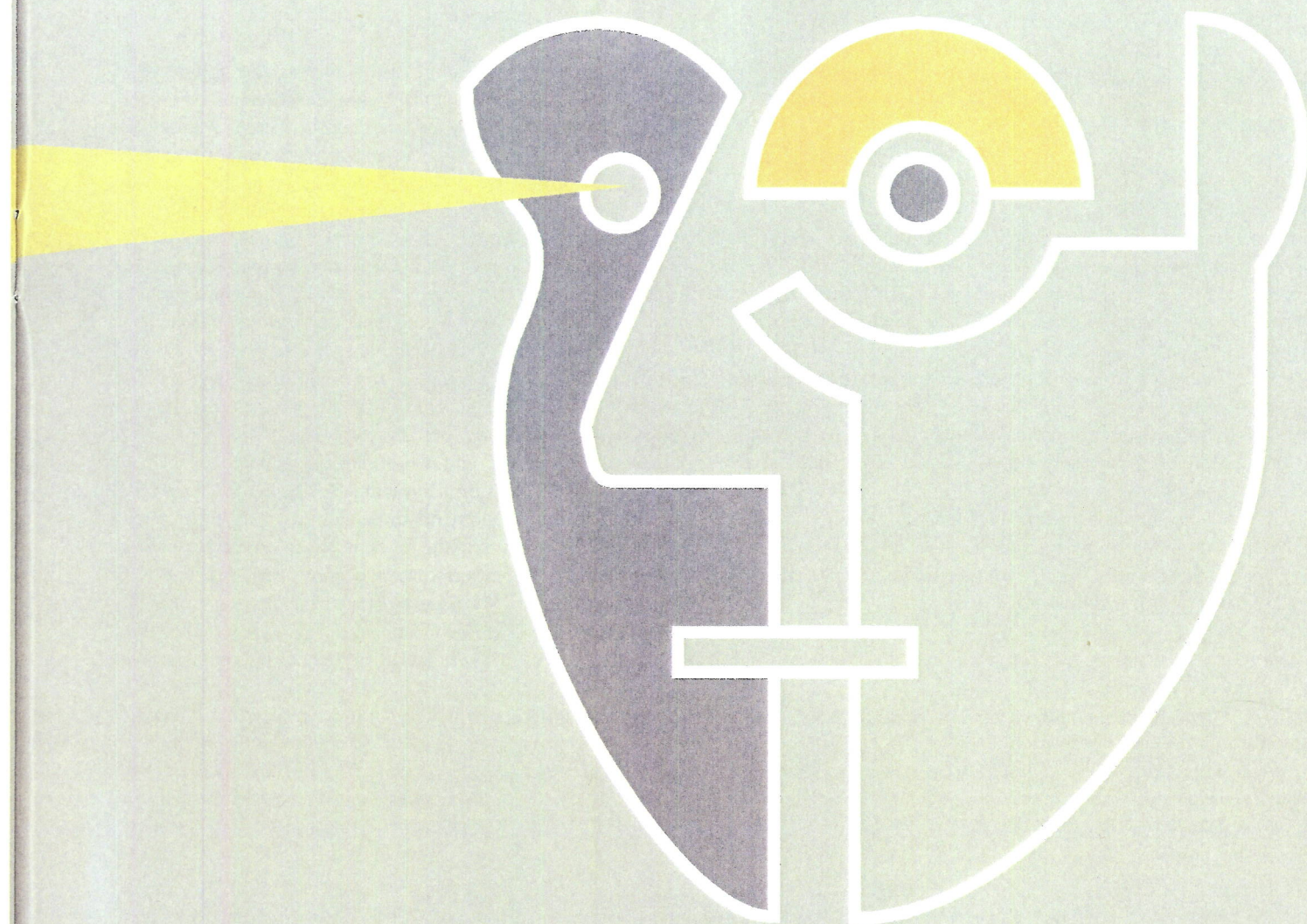
BY JENNIFER A. CRANSTON

Pursuant to recent changes in the Federal Rules of Civil Procedure, draft expert reports and communications between attorneys and their retained experts are now considered attorney work product and, therefore, presumptively undiscoverable. So, if you are a civil litigator in federal court, gone are the days of worrying about the discovery of strategy sessions with your experts and spending countless hours and client dollars fighting over who really drafted the expert's opinion.

Or are those days truly gone?

After years of investigation and analysis of perceived problems with expert discovery under Rule 26 of the Federal Rules, the Advisory Committee on Federal Rules of Civil Procedure ("Advisory Committee") succeeded in revising the federal discovery rule in the hopes of refocusing civil litigators on the merits of expert opinions and away from the minutiae of attorney-expert collaboration. The revised rule, which became effective in December 2010, contains language that dramatically limits expert discovery. However, closer examination reveals terminology that may provide fodder for future discovery disputes and uncertainty regarding what is and is not discoverable.

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Consequences and Failures of Unrestricted Expert Discovery

In 2006, the Advisory Committee began investigating concerns raised by the American Bar Association regarding the discovery of trial expert draft reports and communications with counsel.¹ Specifically, at that time, Rule 26(a)(2)(B) required the expert to disclose “data and other information considered by the witness” in forming his opinions. This language, which was added in 1993, had been interpreted by a number of federal courts to require disclosure of all draft reports and all communications between the expert and the attorney, even if those communications contain traditional attorney work product, such as trial strategy and mental impressions.²

In theory, the Advisory Committee acknowledged that this kind of expansive discovery should uncover the extent of an attorney’s involvement in the formation of the expert’s opinion and report and therefore assist the jury in distinguishing the truly independent experts from the “hired guns” who will opine to

anything upon attorney demand.³

Unfortunately, the investigation revealed several undesirable results that did not comport with the justice-seeking intent of the rule.

Specifically, the Advisory Committee found that the fear of disclosure has led counsel and experts to “take elaborate steps to avoid creating any discoverable record.”⁴ Some attorneys habitually instruct experts to take no notes, create no record of preliminary analyses or opinions, and produce no draft reports. Other attorneys simply avoid practically all collaboration with their experts.

Both practices impede the effective use of experts by restricting communication between the attorney and expert, communications that most likely would lead to a better understanding of the issues in the case and a more refined expert analysis. Another consequence of the federal courts’ broad interpretation of Rule



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26 (which is reflected in case law, though not specifically referenced by the Advisory Committee) is the increased risk of spoliation claims and sanction requests against attorneys who continue to collaborate with their experts but fail to retain all related documents and communications.⁵

Expansive expert discovery also creates additional litigation costs. First, many attorneys hire non-testifying “consulting” experts, whose files and communications with counsel remain undiscoverable. For those attorneys with clients who can afford to pay for two experts, the consulting expert provides the collaboration and feedback that the trial expert would provide but for the fear of discovery. Second, although many attorneys seek to limit discovery regarding their own experts, they simultaneously spend significant time and money trying to obtain the other side’s draft reports and attorney–expert communications.

Perhaps the most damning information revealed in the Advisory Committee’s investigation was the “pragmatic failure” to achieve any significant benefit from unrestricted expert discovery.⁶ According to practitioners’ reports, all the time and money spent trying to uncover evidence of attorney ghostwriting and expert impeachment material “failed to yield useful information in practice” because lawyers and experts developed the various above-referenced strategies to avoid the creation of any such material.⁷

Faced with these results, some attorneys began a practice of affirmatively stipulating to exclude from discovery expert drafts and counsel communications. Similarly, at least one state—New Jersey—expressly modified its discovery rule to limit discovery of such reports and communications.⁸ Attorneys practicing under the New Jersey rule, as well as those who voluntarily stipulate to exclude drafts and expert communications from discovery, unanimously reported to the Advisory Committee their belief that the limited discovery achieved better and more cost-effective results.⁹

Revising Federal Rule 26

In light of its investigative findings, in 2008 the Advisory Committee drafted proposed revisions to Rule 26. The goal of the revisions was to remedy the problems created by the 1993 version of the rule, without prohibiting discovery of legitimate expert issues such as the foundations and merits of expert opinions.¹⁰ Meeting minutes and reports of the Advisory Committee reflect significant debate and analysis regarding the appropriate language and scope of the revisions.¹¹

One of the primary issues discussed was the most effective way to investigate whether an expert’s opinions were unduly influenced by the attorney who retained him. Some argued that review

of draft reports and all communications was the best method. However, the Advisory Committee ultimately determined that the focus on the expert report and the drafting thereof is misguided because the report is only intended to apprise the opposition of the expert’s anticipated testimony; it is not independent evidence.¹² Therefore, whether an attorney had a large or small role in drafting the report and communicating with the expert about his opinion is much less important than whether the expert’s report and testimony truly reflect the expert’s analysis and conclusions.¹³

In June 2008, the proposed amendments were published and distributed for public comment.¹⁴ They received positive responses from most, including the ABA, the American College of Trial Lawyers, the Federal Magistrate Judges Association, the American Association for Justice, the Lawyers for Civil Justice, the Federation of Defense and Corporation Counsel, the Defense Research Institute, and the Department of Justice.¹⁵ The primary opposition to the amendments came from a group of professors who were concerned that the work product protection of draft reports and attorney–expert communications would reinforce the

perception of experts as hired guns and would result in the concealment of significant amounts of relevant information.¹⁶ The Advisory Committee respectfully disagreed with these criticisms by pointing out that (1) it is common knowledge that retained experts are paid to testify and (2) significant amounts of information were left undiscovered under the 1993 rule because of attorney and expert efforts to avoid creating any discoverable materials.¹⁷

In 2009, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States approved the Advisory Committee’s recommended amendments to Rule 26 and submitted them for consideration to the U.S. Supreme Court.¹⁸ The amendments were approved by the Supreme Court in 2010 and became effective on December 1. The three key revisions are:

- **Rule 26(a)(2)(B):** The requirement that testifying experts provide the “data and other information considered” in forming their opinions was rewritten to require the disclosure of “facts or data considered.” According to the Advisory Committee Notes, the intent of this revision is to limit disclosure to “material of a factual nature” and thereby exclude from disclosure “theories or mental impressions of counsel.” The revision retained the term “considered” in order to include factual material that was considered by the expert even though not relied upon.
- **Rule 26(b)(4)(B):** This is a new subsection that reads: “*Trial Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.” The Advisory Committee Notes explain that the protection is intended to apply to written and

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electronic drafts.

- **Rule 26(b)(4)(C):** This is also a new subsection, providing work product

status to all communications between a party's attorney and retained expert,¹⁹ except the following three categories of communications that:

- relate to the expert's compensation;
- identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed;" and
- "identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed."

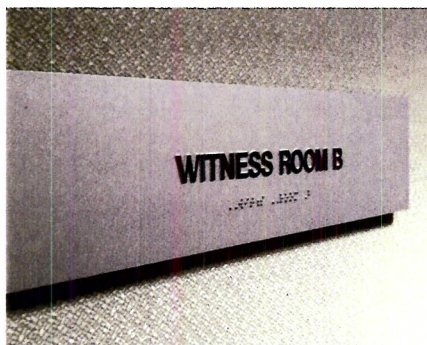
The Advisory Committee Notes provide further explanation of the intended application of these exceptions. For example, the second exception applies only to the communication in which the facts or data are identified; it does not allow discovery of "further communications about the potential relevance of the facts or data." Similarly, the third exception is limited to those assumptions actually relied on by the expert; as the Notes indicate,

"More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts are outside this exception."

Finally, the Advisory Committee Notes point out that, like other attorney work product, draft reports and attorney-expert communications will remain subject to discovery under Rule 26(b)(3)(A)(ii), which authorizes courts to allow discovery if a party shows substantial need and the inability to obtain the substantial equivalent of the work product materials without undue hardship. However, the Notes state that it will be rare for a party to meet this standard, and the opposing party's "failure to provide required disclosures or discovery does not show the need or hardship" required.

Devil in the Details: Interpretation & Application

The Advisory Committee was cognizant of the need to use clear language in the revised rule; otherwise, the revisions would risk failure and additional, unnecessary litigation over the proper



KEY REVISIONS TO RULE 26, FRCP

Disclosure of Expert Testimony

Rule 26 (a)(2)(B)

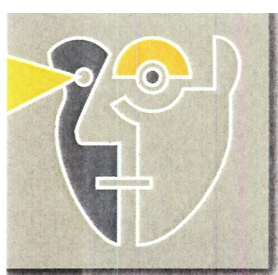
- (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete

statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Trial Preparation: Experts

Rule 26 (b)(4)(B)-(C)

- (B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.
- (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.



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interpretation.²⁰ However, drafting rules with this kind of clarity is an extraordinarily difficult task, and not all potential pitfalls can be addressed. Accordingly, the following three hypothetical conflicts are presented for illustration purposes only; they are not intended to be a criticism of the Advisory Committee's work.

HYPOTHETICAL 1:

Assumptions considered but not relied upon

One source of potential conflict noted by members of the Advisory Committee is the language used in Rule 26(b)(4)(C) to describe the categories of attorney-expert communications that remain discoverable.²¹ Specifically, the second category permits discovery of communications in which the attorney identifies "facts or data" that are "considered" by the expert, while the third category permits discovery of communications in which the attorney identifies "assumptions" that are actually "relied upon" by the expert.

The distinction between facts/data and assumptions is one that may be blurred in real-life practice. The same can be said of the line between consideration and reliance. Attorneys who wish to avoid discovery will try to characterize their communications as identifying assumptions that were considered by the expert but not relied upon.

For example, a savvy attorney could brief his expert about the case using hypothetical assumptions and then instruct the expert to rely upon only those that produce a favorable expert opinion, thereby shielding from discovery all the other "assumptions" that were not relied upon. This strategy would be particularly available to an attorney who has access to factual information about the case that may be harmful to his position but not subject to a standard discovery request from opposing counsel. Because the federal disclosure rules do not require a party to disclose unfavorable information, Rule 26(b)(4)(C) arguably provides a mechanism for advocates to explore potentially negative facts with their experts and simultaneously conceal them from the other side.

HYPOTHETICAL 2:

Attorney input transmitted via draft report

The interplay between Rules 26(b)(4)(B) and 26(b)(4)(C) provides a breeding ground for another potential area of discovery disputes. The former deems all draft reports, including electronic versions, to be work product and therefore presumptively undiscoverable. The latter, as discussed previously, permits discovery of certain attorney-expert communications. The potential conflict

arises when the arguably discoverable communication occurs in the exchange of a draft report.

For example, it is common practice in preparing a report or disclosure to send electronic versions back and forth between attorney and expert and include comments and suggestions regarding the content of the document in the draft itself. Does an otherwise discoverable communication in which the attorney identified facts to be considered or assumptions to be relied upon by the expert become undiscoverable because the communication is embedded in a draft report?

The answer to this question obviously has an impact on a variety of practical and strategic decisions, including whether and how drafts are preserved. Unfortunately, none of the Advisory Committee's meeting minutes, reports or Notes provide insight into this potential conflict.

HYPOTHETICAL 3:

Undiscoverable but admissible evidence

Finally, in drafting the revised rule, the Advisory Committee struggled with the distinction between discovery and evidentiary rules. In the initial version of the amendments distributed for comment in 2008, the Advisory Committee Notes included an express expectation that the new work product limitations would "ordinarily be honored at trial."²² However, during the comment period a number of respondents argued that this statement attempted to create an evidentiary privilege, which can be accomplished only by an affirmative act of Congress.²³ Accordingly, the Advisory Committee revised the Notes to eliminate the statement

at issue and instead stress that there is no intent to infringe on the trial court's evidentiary jurisdiction.²⁴

Yet, the tension between what is discoverable and what is admissible will continue. As the Advisory Committee materials make clear, though counsel will not be allowed to specifically ask about the opposing counsel's role in preparing the expert's report, nothing prohibits the expert from testifying to counsel's role.²⁵

For example, at a deposition, plaintiff's counsel could ask permissible questions regarding how the defense expert formed his opinion and why he failed to consider alternative theories. In response, the expert could volunteer information about conversations with defense counsel regarding undiscoverable hypotheticals. When trial comes around, whether the expert's response is admissible is an evidentiary issue for the trial court, which may or may not be influenced by the new Rule 26 discovery restrictions.

Such disclosures typically are not a problem with attorney work product because attorneys are not witnesses. But the possibility of inadvertent disclosure by expert testimony and the

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additional doors such disclosure could open may become a significant issue in future litigation.

Conclusion

The recently revised Federal Rule 26 seems to take a significant step toward remedying the problems created by unrestricted expert discovery. And it certainly instills hope that civil litigators in federal court will feel a greater sense of comfort in freely communicating with their experts and focusing their attention on the

merits of opposing expert opinions.

Yet, as a practical matter, it is entirely likely that future discovery disputes will arise over the interpretation and application of the new rule. Likewise, some advocates will not be deterred from continuing their search for evidence of the bought-and-paid-for expert opinion. Overall, as with most changes in the law (and life), time will be the best judge of whether the new Rule 26 achieves its goal of reducing discovery costs—including elaborate discovery avoidance techniques—without sacrificing access to information that is required for the adversary system to function properly. ■



1. Committee on Rules of Practice and Procedure, Standing Committee Meeting Minutes (June 2006). All Committee Meeting Minutes and Reports are available online at www.uscourts.gov.
2. See, e.g., *Herman v. Marine Midland Bank*, 207 F.R.D. 26, 28-29 (W.D.N.Y. 2002) (citing the agreement between the “overwhelming majority of district courts in this Circuit as well as in other jurisdictions” that Rule 26(a)(2)(B) requires disclosure of all documents and information provided to a testifying expert even if the expert did not rely on the materials in forming his opinion and regardless of whether the materials would be otherwise protected as ordinary or core attorney work product); *South Yuba River Citizen's League v. Nat'l Marine Fisheries Serv.*, 257 F.R.D. 607, 615 (E.D. Cal. 2009) (adopting interpretation of Rule 26 requiring disclosure of all expert drafts). See also ABA Recommendation No. 120A (August 2006) (reviewing federal case law interpreting expert disclosure obligations).
3. Advisory Committee, Report to Standing Committee (June 2008) (“June 2008 Standing Committee Report”).
4. Committee on Rules of Practice and Procedure, Report of the Judicial Conference (September 2009) (“September 2009 Judicial Conference Report”).
5. See, e.g., *Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D. Va. 2001) (analyzing spoliation claims arising from failure to retain and produce draft expert reports and communications); *Jama v. Esmor Correctional Serv.*, 2007 U.S. Dist. LEXIS 45706 (D.N.J. 2007) (granting request for attorneys’ fees as sanction for failure to produce expert documents and communications); *University of Pittsburgh v. Townsend*, 2007 U.S. Dist. LEXIS 24620 (E.D. Tenn. 2007) (finding violation of obligation to preserve and disclose communications with expert, but declining to grant sanction request).
6. June 2008 Standing Committee Report, *supra* note 3.
7. *Id.*
8. R. 4:10-2, *N.J. Court Rules*.
9. June 2008 Standing Committee Report, *supra* note 3.
10. Committee on Rules of Practice and Procedure, Standing Committee Meeting Minutes (January 2009) (“January 2009 Standing Committee Meeting Minutes”).
11. See Committee on Rules of Practice and Procedure, Standing Committee Meeting Minutes (January 2008); Committee on Rules of Practice and Procedure, Standing Committee Meeting Minutes (June 2008) (“June 2008 Standing Committee Meeting Minutes”); June 2008 Standing Committee Report, *supra* note 3.
12. June 2008 Standing Committee Meeting Minutes, *supra* note 3.
13. *Id.*
14. January 2009 Standing Committee Meeting Minutes, *supra* note 10.
15. Committee on Rules of Practice and Procedure, Standing Committee Meeting Minutes (June 2009).
16. January 2009 Standing Committee Meeting Minutes, *supra* note 10.
17. *Id.*
18. September 2009 Judicial Conference Report, *supra* note 4; Judicial Conference, Report to Hon. John G. Roberts, Chief Justice of the United States (December 2009).
19. The work product protection under this new provision only applies to retained expert witnesses. Under another revision, which added Rule 26(a)(2)(C), experts who are not retained or specifically employed to provide testimony (such as treating physicians or fact witnesses who also qualify as experts) are not required to prepare a report and counsel’s communications with them are not protected work product.
20. June 2008 Standing Committee Meeting Minutes, *supra* note 11.
21. *Id.*
22. June 2008 Standing Committee Report, *supra* note 3.
23. January 2009 Standing Committee Meeting Minutes, *supra* note 10.
24. Compare June 2008 Standing Committee Report, *supra* note 3 with September 2009 Judicial Conference Report, *supra* note 4.
25. See June 2008 Standing Committee Meeting Minutes, *supra* note 10 (expert may not be asked whether the attorney who retained him helped write the report or made changes to it); June 2008 Standing Committee Report, *supra* note 3 (rule does not regulate expert’s answers; “If the expert is asked why a particular theory was not explored, for example, the expert is free to answer ‘because my lawyer told me not to,’ or ‘because my lawyer directed me to explore only the theory that supports my opinion.’”).